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Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WHARF CABLE LIMITED,

Petitioner,

v.

UNITED INTERNATIONAL HOLDINGS, INC. AND UIH ASIA INVESTMENT CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 12, 1996

36 pp

QUESTIONS PRESENTED

The Tenth Circuit's failure to enforce international arbitration of this multi-million dollar dispute over ownership claims to a Hong Kong cable television station poses two issues of serious concern for "the emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985):

1. Whether, contrary to the position of the Fourth, Fifth and Seventh Circuits, the Tenth Circuit correctly concluded that arbitration can be defeated by adding parties to the judicial proceeding who are not signatories to the arbitration agreement.

2. Whether, contrary to the position of the Second Circuit, the Tenth Circuit correctly resolved the issue of arbitrability on the basis of the parties' legal theories, rather than their underlying factual dispute.

PARTIES TO THE PROCEEDING

Petitioner, Wharf Cable Limited, was a Defendant-Appellant below. Respondents, United International Holdings, Inc. and UIH Asia Investment Co., were Plaintiffs-Appellees below.

Under this Court's Rule 29.6, Petitioner states that it is a wholly-owned subsidiary of Cable Network Communications Limited, which is a wholly-owned subsidiary of Wharf Communications Investments Limited, which in turn is a wholly-owned subsidiary of The Wharf (Holdings) Limited. The Wharf (Holdings) Limited is publicly traded on the Hong Kong stock exchange.

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Petitioner, Wharf Cable Limited, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit entered on February 9, 1996.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Tenth Circuit is reproduced in the Appendix ("App.") at 1a-10a.

The district court's unpublished minute order denying Petitioner's Motion to Compel Arbitration is reproduced at App. 11a-13a.

JURISDICTION

The judgment of the Tenth Circuit was entered on February 9, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1993).

PERTINENT STATUTORY PROVISIONS

Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3 (1970), provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Section 4 of the Act, 9 U.S.C. §4, provides in pertinent part:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in

admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

STATEMENT OF THE CASE

A. Nature of the Case

Respondents sued in the district court, asserting federal jurisdiction under 28 U.S.C. § 1331, to recover on an alleged oral contract, claiming they were promised a 10% interest in petitioner's Hong Kong cable television franchise in exchange for specified technical services to develop that franchise. Petitioner moved to compel arbitration of the claim on the ground that the same technical services were the subject of a written Technical Cooperation Agreement, which provided respondents would have no equity interest in the cable franchise and would instead be compensated through quarterly fees, and which contained a clause stating that "any disputes arising from, or in connection with this Agreement shall be arbitrated in Hong Kong." This petition seeks review of the refusal by the courts below to enforce this arbitration agreement pursuant to 9 U.S.C. § 3.

B. The Parties and Their Dispute

Petitioner Wharf Cable Limited ("Wharf Cable") is a Hong Kong company that was awarded the subscription television franchise by the Hong Kong government on June 1, 1993. App. at 1a, 4a. Wharf Cable is wholly-owned by The Wharf (Holdings) Limited through affiliated intermediaries, which are also Hong Kong companies. App. at 2a, 4a n.2.

In 1991, respondent United International Holdings, Inc. ("UIHI") approached the Wharf companies about a cooperative venture to bid for, and develop, the Hong Kong cable franchise. App. at 2a. UIHI is a Delaware corporation, based in Denver, which provides technical services to cable television systems outside the United States. *Id.*

At the time of the initial contact, the Wharf group was already in discussions with a NYNEX subsidiary regarding such a joint venture, and the three companies carried on active negotiations over a tri-partite arrangement through the Fall of 1992. *Id.* One of the options considered was for NYNEX and UIHI to obtain minority interests in Wharf Cable, but the three companies were unable to agree on the terms of such an investment. App. at 2a-3a, 4a n.1.

Instead, the companies negotiated and executed two separate Technical Cooperation Agreements: one between Wharf Cable and UIHI and the other between Wharf Cable and NYNEX. App. at 3a. The Technical Cooperation Agreement with UIHI (the "TCA") appointed it as one of Wharf Cable's "principal technical advisors to provide services with respect to the design, construction, operation, maintenance, administration, marketing and programming of the CATV System," in return for which it would receive quarterly fees for three years. TCA ¶3 in App. to Appellants' Tenth Circuit Brief ("Wharf 10th Cir. App.") at 48-61. The TCA was explicit that:

> "UIH shall have no right or interest in the Company or in the CATV System, nor any claim or lien with respect thereto, arising out of this Agreement or the performance of its services hereunder." TCA ¶7.

The Agreement was equally specific that written notice had to be given of "any additional or supplemental agreements," and that "[a]dditional oral agreements are invalid." TCA ¶¶ 14.3, 14.8, 14.9.; App. at 3a.

The Technical Cooperation Agreement contained the following mediation and arbitration provisions:

> "13.1 If any dispute, controversy or difference arises between the parties out of, or in relation to, this Agreement or for the breach thereof, the parties shall first attempt in good faith to resolve

amicably such dispute, controversy or difference.

"13.2 If such attempt is unsuccessful, . . . any disputes arising from, or in connection with this Agreement shall be arbitrated in Hong Kong. Such arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce . . . ." TCA ¶¶13.1, 13.2; App. at 3a.

The TCA further provided that:

"This Agreement shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereto hereby irrevocably submit to the non-exclusive jurisdiction of the Hong Kong courts." TCA ¶15.1.

Although most provisions of the TCA were conditional on the award of the franchise, the arbitration clause took effect immediately. *Id.* ¶2; App. at 3a.

Following execution of the two Technical Cooperation Agreements, UIHI, NYNEX and the Wharf group resumed negotiations over a possible joint venture that would include an equity investment in the cable franchise. Once again, however, they were unable to reduce the terms of such an investment to a signed written agreement. App. at 4a. Notwithstanding the explicit provision in the TCA that "[a]dditional oral agreements are invalid," UIHI nonetheless claimed that it reached an oral contract with Wharf to obtain a 10% interest in the latter's cable franchise. *Id.*

C. The District Court Proceedings

When the Wharf group refused to acknowledge UIHI's equity claim, which was not documented by any contemporaneous memorandum, correspondence or other

writing, UIHI filed a twelve-count complaint in the United States District Court for the District of Colorado, joining as defendants not only Wharf Cable, but also its affiliates, Wharf Holdings and Wharf Communications Investments Limited, and Stephen Ng, an officer in each of the Wharf companies. App. at 4a-5a. UIHI also joined as a plaintiff UIH Asia Investment Co. ("UIH Asia"), a Colorado general partnership of which UIHI is the majority owner and which maintained an office in Hong Kong. App. at 2a, 4a; Wharf 10th Cir. App. at 372. Plaintiffs alleged that defendants had breached

> "an oral contract giving plaintiffs an option to purchase a 10% interest in CNCL, Wharf Cable's [immediate] parent, in exchange for various services performed in connection with the development and implementation of the Hong Kong cable franchise." App. at 4a.

These services were "of the same general type as were contemplated under the TCA." App. at 8a. Plaintiffs alleged that defendants' breach of the "oral contract" gave rise to violations of the federal and Colorado securities laws, breach of contract, breach of fiduciary duty, fraud and negligent misrepresentation, promissory estoppel, unjust enrichment, and civil conspiracy. App. at 5a. Wharf Holdings and Wharf Communications were named as defendants in all the claims; Wharf Cable was named in four claims; and Mr. Ng was named in five. *Id.*

Wharf Cable promptly moved to compel plaintiffs to submit all their claims to arbitration in Hong Kong pursuant to the Technical Cooperation Agreement and to stay further proceedings in the district court. Wharf 10th Cir. App. at 36-99. Wharf Cable asserted that the underlying "dispute, controversy or difference between the parties" was one "arising from, or in connection with" the TCA because the technical services on which plaintiffs grounded their contract, securities and tort claims to a 10% equity interest in the cable franchise

were the same services for which UIHI had contracted to receive quarterly fees under the TCA. Consequently, "the heart of this dispute concerns their obligation to provide their knowledge and expertise to Wharf Cable and how they were to be compensated." *Id.* at 276.

The district court summarily denied Wharf's motion, without opinion or explanation. App. at 12a.

D. The Tenth Circuit Opinion

Wharf Cable filed a timely notice of interlocutory appeal to the Tenth Circuit pursuant to Section 16 of the Federal Arbitration Act, 9 U.S.C. §16(a). The court of appeals affirmed the denial of arbitration, holding that:

> "[N]otwithstanding the policy favoring broad interpretation of arbitration clauses, we simply cannot stretch the arbitration clause contained in the TCA to encompass the claims asserted in this litigation. The claims are outside the scope of the TCA, and they are primarily against parent companies of Wharf Cable, not against Wharf Cable itself, the only signatory to the TCA." App. at 7a-8a.

The court of appeals rejected Wharf Cable's contention that UIHI should not be allowed to escape the TCA's broad arbitration clause by joining claims against non-signatories, particularly when the record showed that "UIHI and Wharf Cable were the central players and all other parties simply affiliates." App. at 7a, 9a. Wharf Cable pointed out, for example, that all the correspondence in the record was between UIHI and Wharf Cable, spoke only of technical services by UIHI for Wharf Cable, and made no mention of UIH Asia or any other Wharf Company. Wharf 10th Cir. App. at 48-61, 251-55, 324-26. In refusing arbitration, the Tenth Circuit did not discuss any of the decisions cited by petitioner from other circuits that have concluded that arbitration cannot be defeated

by joining parties who were not signatories of the arbitration agreement.

The Tenth Circuit also rejected Wharf Cable's argument that, whatever legal labels plaintiffs attached to their claims, "the dispute between the parties in this case, including any allegations based upon the claimed oral contract," all "'involve matters related to' the TCA -- i.e., technical services to be provided for Wharf Cable by UIHI in exchange for some kind of compensation." App. at 7a. Here again, the Tenth Circuit essayed no response to the position taken by other circuits that arbitrability should be decided on the basis of the nexus between the parties' underlying factual dispute and the agreement containing the arbitration clause, rather than on the basis of plaintiffs' legal theories.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly underscored that the Federal Arbitration Act establishes a "liberal federal policy favoring arbitration agreements," and that this policy "applies with special force in the field of international commerce." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Mitsubishi*, 473 U.S. at 631. The presumption in favor of arbitration is so strong that it is overcome only where "it may be said *with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (citations omitted) (emphasis added). Although the Tenth Circuit paid lip service to these general principles, its decision:

> *First*, to exclude non-signatories from the reach of a broadly-worded arbitration clause, and
>
> *Second*, to resolve arbitrability on the basis of plaintiffs' legal theories, rather than the nature of the parties' underlying factual controversy,

stultifies the application of those principles in practice, conflicts with better-reasoned rulings of other circuits, and gives rise to ill-conceived avenues of escape for parties opposing arbitration.

1. The Tenth Circuit Erred in Allowing a Plaintiff to Avoid Arbitration By Adding Parties to a Lawsuit Who Were Not Signatories to the Arbitration Agreement.

The Tenth Circuit rested its refusal to apply the TCA's arbitration clause to Wharf Cable and its affiliates on what it viewed as "the fundamental point" that "Wharf Cable was a separate legal entity from the other Wharf companies, and Wharf Cable alone, not its affiliates or parent companies, signed the TCA." App. at 9a. The court cited its opinion in *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455 (10th Cir.

1995), as holding that "[c]ourts do not lightly pierce the corporate veil even in deference to the strong policy favoring arbitration." *Id.* at 1461 (internal quotation omitted).

Several other circuits have refused to adopt such a formalistic approach. In *J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), the Fourth Circuit relied on the strong federal policy favoring arbitration to conclude that a non-signatory parent should be covered under circumstances closely paralleling those here. Plaintiff had sued Rhone Poulenc, the large French conglomerate, and four of its French and German affiliates. While plaintiff (as here) alleged a broad array of legal claims, ranging from civil conspiracy to unfair trade practices to defamation, they all centered on its core factual charge that Rhone Poulenc had acted in concert with its affiliates to terminate the latters' distribution contracts with plaintiff, each of which contained a clause calling for international arbitration. The Fourth Circuit rejected plaintiff's contention that, "because it had no contractual relations with Rhone, the district court erred in referring its claims against Rhone to arbitration." *Id.* at 320. The court reasoned that,

> "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *Id.* at 320-21.

The Fourth Circuit called attention to this Court's admonition that "any doubts concerning the scope of arbitratable issues should be resolved in favor of arbitration." *Id.* at 321 (citing *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25). It also pointed out that the arbitration clause recommended by the International Chamber of Commerce -- which was the clause at issue in *Ryan*, as here -- "must be construed to encompass a broad scope of arbitrable issues. The

recommended clause does not limit arbitration to the literal interpretation or performance of the contract." *Id.*

The Fifth Circuit reached the same result in *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976). The arbitration clause in that case appeared in an agency contract with a U.S. sales subsidiary, to which its Belgian parent was not a party. Nevertheless, the Fifth Circuit had no difficulty including "Eteco's parent and successor corporations in its stay order [against further judicial proceedings], even though they were not formally parties to the 1960 contract." *Id.* at 681. The court stressed: "If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Id.*

The same policy considerations that favor extending an arbitration agreement to affiliated corporations apply with equal force to officers and directors, like Mr. Ng, who signed the Technical Cooperation Agreement as an officer of Wharf Cable, but who is now sued in his personal capacity. As the Sixth Circuit explained in ordering arbitration regarding such an officer in *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990):

> "We agree with the district court that if appellant 'can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified.'" *Id.* at 1281 (citations omitted).

Just as other circuits have had no difficulty concluding that a party cannot avoid arbitration by joining non-signatory *defendants*, they have also ruled that arbitration cannot be circumvented by adding non-signatory *plaintiffs*, as UIHI has done by joining its controlled affiliate, UIH Asia. In *In re Oil*

Spill by Amoco Cadiz, 659 F.2d 789 (7th Cir. 1981), Amoco Transport joined its affiliate, Amoco International, in an action against the owner of a salvage tug. Like UIH Asia, Amoco International then sought to avoid the arbitration agreement between Amoco Transport and the tug owner on the ground that its own claims were

> "independent of those raised by Transport and that these independent claims give it a separate basis on which to assert a right to a judicial forum stemming from the fact that International never entered into any agreement with Bugsier and has never consented to have its disputes resolved by arbitration." *Id.* at 795.

The Seventh Circuit rejected this argument, emphasizing that "International's stake in this controversy is as Transport's agent," which is equally true of UIH Asia vis-a-vis UIHI. *Id.* at 795-96.

> "Having alleged an agency relationship as a basis for its standing in the suit, it cannot slough off that relationship at will. It would advance neither judicial economy nor the purposes of the federal arbitration act to permit International to assert in a judicial forum claims grounded upon its alleged relationship to Transport and to allow it to disavow the relationship for purposes of arbitration, or to allow Transport to defeat the effect of an arbitration agreement by joining a nonsignatory as a party-plaintiff in its complaint." *Id.* at 796.

Although many circuits have taken a liberal approach toward including affiliated companies, their officers and directors within the reach of a broadly-worded arbitration clause, the Tenth Circuit's more restrictive view was echoed by the Ninth Circuit in *Britton v. Co-Op Banking Group*, 4 F.3d 742, 743 (9th Cir. 1993). The court held the purchaser of a company could not invoke an arbitration clause signed by his

company, because he "was not a third party beneficiary or successor in interest to the contract . . . [and] none of his allegedly wrongful acts arose out of or were related to the contract." Importantly, the dissent in *Britton* criticized the ruling as ignoring "contemporary federal principles on the issue of arbitrability." *Id.* at 748.

> "We are not free to disregard the presumption in favor of arbitration and weigh the arbitrability of this dispute on an even scale. Because I believe the arbitration clause in this case is unquestionably 'susceptible of an interpretation that covers the asserted dispute,' I would follow the Court's mandate and direct the matter to arbitration." *Id.* (citing *AT&T Tech.*, 475 U.S. at 650).

In sum, this Court should grant certiorari to resolve this pivotal disagreement over how its pro-arbitration directives should be applied to non-signatories of an arbitration agreement, particularly where affiliated corporations, officers and directors are involved.

2. The Tenth Circuit Erred by Resolving the Issue of Arbitrability on the Basis of Plaintiffs' Legal Theories, Rather Than the Parties' Underlying Factual Dispute.

This Court should also review the second arbitration hurdle erected by the Tenth Circuit which, in deciding arbitrability, focused on the "array of claims asserted against the Wharf group in this case," rather than on their close factual nexus with the agreement containing the arbitration clause. App. at 9a. Here, too, the Tenth Circuit gave precedence to pleading formalities over factual substance, in contrast to the better-reasoned decisions of other circuits.[1]

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[1] The Tenth Circuit's formalistic approach was also reflected in its concern that only Wharf Cable moved to compel arbitration. App. at 5a, 8a-9a n.3. The Federal Arbitration Act expressly provides, however, that any "party aggrieved by the (continued...)

Thus, the Second Circuit recently ruled in *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16 (2d Cir. 1995), that the arbitrability of claims is

> "not controlled by the characterization of them in the pleading. Instead, we look to the conduct alleged and determine whether or not that conduct is within the reach of the . . . arbitration clause." *Id.* at 20.

Quoting from its earlier decision in *Genesco, Inc. v. T. Kakiuchi & Co. Ltd.*, 815 F.2d 840 (2d Cir. 1987), the court concluded:

> "If the allegations underlying the claims 'touch matters' covered by the parties' sales agreements, then those claims must be arbitrated, whatever the legal labels attached to them." *Id.* at 846 (citing *Mitsubishi*, 473 U.S. at 622 n. 13), *quoted in Collins & Aikman*, 58 F.3d at 21.

The Second Circuit further stressed that the court is

> "to look to allegations of [the] party demanding arbitration and -- if they fall within the scope of the parties' agreement -- [the] court should compel arbitration, no matter how frivolous [the] allegations appear to be." 58 F.3d at 19.

Otherwise, the party in opposition could frustrate arbitration by spinning out multiple causes of action from a single core of operative facts.

The result below is an excellent example of such an improper result. Petitioner's motion to compel arbitration urged that, no matter how many different causes of action plaintiffs might allege, the parties' dispute came down to how

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[1] (...continued)
alleged failure, neglect, or refusal of another to arbitrate" may file such a motion, and the district court "shall on application of one of the parties" stay the trial of the action. 9 U.S.C. §§ 3, 4.

UIHI is to be compensated for its technical services. Is it in the form of the quarterly fees spelled out in the TCA, or in the form of an equity investment under plaintiffs' alleged "oral contract"? This pivotal dispute over plaintiffs' technical services and their compensation not only "touches matters" covered by the TCA, it is at the heart of both that agreement and the asserted oral agreement. This is brought home by the footnote table, which demonstrates that UIHI's services under the TCA were virtually identical to those on which plaintiffs ground their complaint.[2]

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[2]

TCA Services	"Oral Contract" Services
• Negotiate with suppliers for discount prices. ¶ 5(a)(iii)	• Negotiate with suppliers for special prices. ¶ 58(2)
• Advise Wharf Cable on programming negotiations. ¶ 5(c)(i) & (ii)	• Advise Wharf Cable on programming negotiations. ¶ 58(10)
• Assist in designing and implementing Information Technology. ¶ 5(d)	• Design and implement Management Information System. ¶ 58(6)
• Assist in identifying and evaluating personnel. ¶ 5(e)(ii)(D)	• Identify and evaluate personnel. ¶ 58(9)
• Provide UIH personnel to Wharf Cable. ¶¶ 4(e), 5(e)(iii)	• Provide UIH personnel to Wharf Cable. ¶ 58(8)

(continued...)

The Tenth Circuit, by dismissing what it described as the "mere fact" that plaintiffs' asserted legal claims were all based on providing "services to Wharf Cable of the same general type as were contemplated under the TCA," App. at 8a, substituted pleading formalities for commercial reality. The court lost sight of the sound rule articulated by the Seventh Circuit in the *Amoco Cadiz* case:

> "Whether a particular claim is arbitrable depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause. Were the rule otherwise, a party could frustrate any agreement to arbitrate simply by the

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[2] (...continued)

• Assist in designing network. ¶ 5(a)	• Rework network design. ¶ 58(4)
• Assist in negotiating vendor contracts. ¶ 5(a)(iii)	• Re-negotiate vendor contracts. ¶ 58(7)
• Recommend cable equipment. ¶ 5(a)(ii)(B)	• Recommend use of converter boxes. ¶ 58(3)
• Advise Wharf Cable regarding marketing plan. ¶ 5(b)	• Revise Wharf Cable marketing plan. ¶ 58(5)
• Assist in formulating overall design, construction and operation. ¶ 4(a). TCA ¶¶ 4, 5	• Rewrite Wharf Cable "business plan". ¶¶ 58(1), (11). Wharf 10th Cir. App. at 354-55

manner in which it framed its claims." 659 F.2d at 794.[3]

3. The Issues Are Important to Arbitration Generally, But Especially to Disputes in International Commerce.

Artificial deterrents to arbitration should be avoided in any case. They are particularly unjustified in the international arena, where

> "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

Here, UIHI is a sophisticated participant in the international business world. It went to Hong Kong to solicit a role in Wharf Cable's cable television franchise. Through UIH Asia, it set up and maintains an office in Hong Kong. It negotiated and signed in Hong Kong a detailed Technical Cooperation Agreement calling for the performance of services there. As part of that agreement, UIHI specifically agreed that any disputes would be arbitrated in Hong Kong. It also agreed that Hong Kong law would apply. Under these circumstances, UIHI should not be heard to complain that it must now live up to its arbitration undertaking.

The importance of preserving international arbitration agreements cannot be overstated in a time when the nation's commitment to free trade is under attack. As this Court underlined in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), arbitration clauses that specify in advance the forum in

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[3] Here, plaintiffs even went so far as to reframe their complaint on appeal, stating at oral argument that "only one claim -- for unjust enrichment, brought alternatively to their main claims -- now remains against Wharf Cable." App. at 5a.

which disputes are to be litigated, and the law to be applied, are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516.

> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parities to secure tactical litigation advantages . . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 516-17.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation, and UIH ASIA INVESTMENT CO., a Colorado general partnership, Plaintiffs - Appellees, v. WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; WHARF CABLE LIMITED, a Hong Kong company; and STEPHEN NG, a Hong Kong citizen, Defendants - Appellants.	No. 95-1184 (D. Colorado) (D.C. No. CIV-94-N-2560)

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **ANDERSON** and **McWILLIAMS,** Circuit Judges, and **HOLMES,**** District Judge.

We must decide in this case whether an arbitration clause in a technical cooperation agreement mandates arbitration of a dispute between plaintiffs/appellees United International Holdings, Inc. ("UIHI") and UIH Asia Investment Co. ("UIH Asia"), a Colorado general partnership of which UIHI is the majority owner and managing partner, and defendants/ appellants The Wharf (Holdings) Limited ("Wharf Holdings"), Wharf Communications Investments Limited ("Wharf Communications"), Wharf Cable Limited ("Wharf Cable"), and Stephen Ng, an officer in each of the defendant Wharf companies. The district court held it did not, and summarily denied defendant Wharf Cable's motion to compel arbitration. Defendants have filed a motion to expedite this appeal, which has been referred to this panel. A jury trial is set to commence in this case in the federal district court in Colorado on February 17, 1997. The Final Trial Preparation Conference is set for January 17, 1997. The motion to expedite this appeal is now moot. We affirm the district court's order denying Wharf Cable's motion to compel arbitration.

BACKGROUND

UIHI is a Delaware company based in Denver which provides technical services to cable television systems outside the United States. UIH Asia is a Colorado general partnership of which UIHI is the majority owner and managing partner.

In 1991, Wharf Holdings and its 100% owned subsidiary, Wharf Communications, both Hong Kong companies, explored the possibility of applying for a cable television franchise in

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** The Honorable Sven E. Holmes, United States District Court for the Northern District of Oklahoma, sitting by designation.

Hong Kong. The deadline for submitting the franchise application to the Hong Kong government was September 30, 1992. From late 1991 through the fall of 1992, the Wharf companies and UIHI discussed the possibility of engaging in a cooperative venture between those companies and a subsidiary of NYNEX, one of the "Baby Bell" telephone companies. As the deadline for the submission of the application approached, and the parties were unable to agree on the terms of the venture, they entered into two separate Technical Cooperation Agreements, one between Wharf Cable and UIHI and one between Wharf Cable and NYNEX. The Technical Cooperation Agreement between Wharf Cable and UIHI ("TCA") is directly relevant to this case.

The TCA provided that, if Wharf Cable got the Hong Kong cable franchise, UIHI would provide a variety of technical services in exchange for quarterly fees. It further provided that written notice had to be given of "any additional or supplemental agreements to this Agreement" and that "[a]dditional oral agreements are invalid." Agreement ¶¶ 14.3, 14.8, 14.9, Appellants' App. Vol. II at 497-98. It also contained the following clauses relating to arbitration of disputes:

> 13.1 If any dispute, controversy or difference arises between the parties out of, or in relation to, this Agreement or for the breach thereof, the parties shall first attempt in good faith to resolve amicably such dispute, controversy or difference.
>
> 13.2 If such attempt is unsuccessful, such dispute, controversy or difference shall be resolved by arbitration in [sic] or any other place agreed upon by the parties. Notwithstanding the first sentence, any disputes arising from, or in connection with this Agreement shall be arbitrated in Hong Kong. Such arbitration shall be conducted in accordance with the Rules of

> Conciliation and Arbitration of the International Chamber of Commerce . . . .

Agreement ¶¶ 13.1, 13.2, *id.* at 497. Most provisions of the TCA, but not the paragraph concerning arbitration, were "conditional" upon the award of the franchise. Agreement ¶ 2, id. at 488.

Wharf Cable submitted its franchise application, including the TCA, on September 30, 1992, and was awarded the franchise by the Hong Kong government on June 1, 1993. Apparently, throughout their negotiations, UIHI had always expressed an interest in investing in the Wharf Cable project, thereby becoming an equity participant in the Hong Kong cable television venture.[3] While there were early discussions concerning an investment in Wharf Cable, the parties eventually resolved, as they indicated at oral argument of this case, that the investment would be through Wharf Cable's newly formed parent, Cable Network Communications Limited ("CNCL").[4] They were never, however, able to agree and reduce to a written agreement the terms of such an investment. A major disputed factual question in this case is whether the parties nonetheless entered into an oral contract concerning UIHI's acquisition of a 10% interest in CNCL.

When the Wharf group continued to refuse to permit UIHI's 10% investment, UIHI and UIH Asia filed a twelve-count complaint in the federal district court in Colorado, against Wharf Cable, Wharf Communications, Wharf Holdings, and

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[3] UIHI and UIH Asia claim that they always seek an ownership interest in international cable television systems for which they provide technical assistance: "UIHI lends its unique expertise in international [cable television systems] only to cable projects in which it is an investor or in which it owns the right to invest." Appellees' Br. at 8. Thus, they assert that it was clear all along that an ownership interest by UIHI in a Wharf company was essential to the relationship.

[4] The final structure of the Wharf group was as follows: Wharf Holdings was the 100% owner of Wharf Communications, which was the 100% owner of CNCL, which was the 100% owner of Wharf Cable.

Stephen Ng, claiming that they had breached an oral contract giving plaintiffs an option to purchase a 10% interest in CNCL, Wharf Cable's parent, in exchange for various services performed in connection with the development and implementation of the Hong Kong cable television franchise. Plaintiffs' [sic] averred in their complaint that, pursuant to this oral contract, they provided a variety of technical services, including designing cable and information systems, assisting with the negotiation of contracts, consulting on business strategies, and assisting with the hiring of employees and the arrangement of financing. UIHI apparently provided these services over a period of time, commencing before the franchise application was made and continuing beyond the time when the franchise was awarded. Among the claimed violations were violations of the federal and Colorado securities laws, breach of contract, breach of fiduciary duty, fraud and negligent misrepresentation, promissory estoppel, unjust enrichment, and civil conspiracy. Wharf Holdings and Wharf Communications are parties to all of these claims. Wharf Cable was a named defendant in four claims -- promissory estoppel and unjust enrichment, brought alternatively to the breach of contract claim, and common law fraud and conspiracy. Stephen Ng was named in his individual capacity in five claims, including securities and common law fraud and promissory estoppel. At oral argument, plaintiffs stated that only one claim -- for unjust enrichment, brought alternatively to their main claims -- now remains against Wharf Cable.

Defendant Wharf Cable moved to compel arbitration under the arbitration clause of the TCA. The other Wharf companies did not join in the motion. The district court denied the motion, and Wharf Cable brought this appeal, seeking interlocutory review pursuant to the Federal Arbitration Act, 9 U.S.C. § 16(a). The other Wharf defendants also initially appealed the district court's denial of their motion to dismiss plaintiffs' claims on forum non conveniens grounds. They have now

voluntarily withdrawn the forum non conveniens issue from this appeal. See Appellants' Br. at 3 n.1.

DISCUSSION

"We review a district court's grant or denial of a motion to compel arbitration de novo, applying the same legal standard employed by the district court." *Armijo v. Prudential Ins. Co.*, Nos. 94-2131, 94-2132, 94-2257, 1995 WL 7438601, at *2 (10th Cir. Dec. 15, 1995); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1513 (10th Cir. 1995).

Under the Federal Arbitration Act (FAA), 9 U.S.C. § 3, a district court must stay judicial proceedings where a written agreement provides that the subject of the litigation must be submitted to arbitration. "'There is a strong federal policy favoring arbitration for dispute resolution.'" *Coors Brewing Co.*, 51 F.3d at 1514 (quoting *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 465 (10th Cir. 1988)). This policy is "particularly strong in the context of international transactions." *Id.* If there is uncertainty as to whether a claim is arbitrable, "[a]ll 'doubts are to be resolved in favor of arbitrability.'" *Id.* (quoting *Oil, Chem., & Atomic Workers Int'l Union, Local 2-124 v. American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976)).

However, arbitration is a contractual matter, and parties may not be required to submit to arbitration claims which they have not contractually agreed to submit. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986); *see Coors Brewing Co.*, 51 F.3d at 1516. Thus, as we stated in *Coors Brewing Co.*, only claims having "a reasonable factual connection to the contract" are arbitrable. *Id.*; *cf. Bridgestone/Firestone, Inc. v. Local Union No. 998*, 4 F.3d 918, 922 (10th Cir. 1993) (holding a dispute not subject to arbitration where there was "no way in which the arbitration clause . . . [could] be stretched to cover" the subject matter of the dispute). However, we have also held that a nonsignatory to an arbitration

agreement may nonetheless enforce the agreement if he is a third party beneficiary. *O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 901 (10th Cir. 1992). "An intent to benefit the third party must be apparent from the construction of the contract in light of all surrounding circumstances to qualify that party as a third party beneficiary." *Id.*

Additionally, the Supreme Court has specifically held that courts may separate claims which are subject to arbitration from those which are not. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (observing that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"); *Coors Brewing Co.*, 51 F.3d at 1517 (noting that "the Supreme Court has held that litigation must proceed in a 'piecemeal' fashion if the parties intended that some matters, but not others, be arbitrated").

Appellant Wharf Cable argues that the broad language of the arbitration clause in the TCA, interpreted in light of the strong federal policy favoring arbitration, encompasses the dispute between the parties in this case, including any allegations based upon the claimed oral contract involving the 10% investment in CNCL, because they "involve matters related to" the TCA -- i.e., technical services to be provided for Wharf Cable by UIHI in exchange for some kind of compensation. They further argue that, even though only one of the two plaintiffs in this litigation (UIHI) and one of the four defendants (Wharf Cable) were signatories to the TCA, "UIHI and Wharf Cable were the central players and all other parties simply affiliates." Appellants' Br. at 27. They also argue that "basic principles of contract and agency law" mandate that all the named parties in the litigation are bound by the TCA.

Plaintiffs/appellees, UIHI and UIH Asia, respond that the TCA was signed only by Wharf Cable and UIHI, whereas the litigation in this case is "primarily" against Wharf Holdings and

Wharf Communications, nonsignatories to the TCA. Appellees' Br. at 1. They also assert that plaintiffs/appellees' claims "arise from events that began before the alleged arbitration agreement was drafted, continued long after that 'agreement' even theoretically could have become operative, and did not conclude until after the parties rejected 'activating' that agreement." *Id.*

We hold that, notwithstanding the policy favoring broad interpretation of arbitration clauses, we simply cannot stretch the arbitration clause contained in the TCA to encompass the claims asserted in this litigation. The claims are outside the scope of the TCA, and they are primarily against parent companies of Wharf Cable, not against Wharf Cable itself, the only signatory to the TCA. We therefore affirm the district court's denial of Wharf Cable's motion to compel arbitration.

The TCA was a specific agreement under which UIHI would provide a variety of technical services to Wharf Cable upon its receipt of the Hong Kong cable television franchise. In exchange for these technical services, UIHI was to receive quarterly fees. The TCA specifically provided that the relationship of UIHI to Wharf Cable was that of an independent contractor and UIHI was to have "no right or interest" in Wharf Cable. Agreement ¶ 7, Appellants' App. Vol. II at 493-94. The arbitration clause covered disputes between the parties to the TCA (UIHI and Wharf Cable) arising out of or in relation to the TCA. The TCA contains no reference to Wharf Cable's parent companies.

The allegations in this litigation, by contract, are by UIHI and its subsidiary, UIH Asia, against Wharf Cable, two of its parent companies, and an individual who was an officer in each Wharf company, and involve alleged fraud, misrepresentations, securities violations, contractual violations, breach of fiduciary duties, conspiracy, unjust enrichment, and promissory estoppel in connection with a claimed oral contract permitting plaintiffs to obtain an ownership interest in Wharf Cable's parent, CNCL.

They do *not* involve the performance by UIHI of technical services under the TCA. The mere fact that UIHI provided services to Wharf Cable of the same general type as were contemplated under the TCA, on its claimed expectation of receiving an ownership interest in Wharf Cable's parent, does not, by itself, provide the requisite "factual connection to the contract." *Coors Brewing*, 51 F.3d at 1516.[5] The Supreme Court has said that allegations must "touch matters" covered by the arbitration agreement in order to be subject to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985). The array of claims asserted against the Wharf group in this case are substantially different from claims relating to technical services provided under the TCA.

Moreover, the vast majority of the claims are against defendants *other* than Wharf Cable. At oral argument, Wharf Cable argued strenuously that it, Wharf Cable, was the key player throughout the entire relationship, even though it was a named defendant in only a few claims, and now is a named defendant in only one, and even though it is a subsidiary of other Wharf group companies. They relied in part on a letter dated November 5, 1993 addressed to Stephen Ng at Wharf Cable, and which referred to UIHI's relationship with Wharf Cable and the "Wharf Cable project." *See* Appellants' App. at 324-25. They overlook the fundamental point, however, that Wharf Cable was a separate legal entity from the other Wharf companies, and Wharf Cable alone, not its affiliates or parent companies, signed the TCA. *Cf. ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1461 (10th Cir. 1995) ("Courts do not lightly pierce the corporate veil 'even in deference to the strong policy favoring arbitration.'") (quoting *Califano v. Shearson*

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[5] Furthermore, only Wharf Cable sought to compel arbitration of plaintiffs' claims. The other Wharf companies, non-signatories to the TCA, did not seek to compel arbitration. Repeated references to the other Wharf companies as "affiliates" does not change the fact that they neither signed, nor were referred to in, the TCA.

Lehman Bros., Inc., 690 F. Supp. 1354, 1355 (S.D.N.Y. 1988)).[6]

In sum, we will not, in effect, rewrite the TCA and its arbitration clause to encompass claims wholly unrelated to the TCA and involving parties who did not sign the TCA, and were never mentioned in that agreement. Those claims are too remote, in substance and in distance, from the TCA to compel their arbitration pursuant to that agreement. The policy favoring broad interpretation of arbitration clauses does not permit wholesale redrafting of such clauses.

For the foregoing reasons, the decision of the district court denying the motion to compel arbitration is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

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[6] The Wharf group has provided no evidence suggesting that Wharf Cable should *not* be treated as a separate legal entity.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Deborah Hansen, Dep[illegible] Clerk Date: April 18, 1995

Jeannette Gallardo, E.C.R.

Civil Action No. 94 N 2560

Parties:	*Counsel*:
UNITED INTERNATIONAL HOLDINGS, INC., et al.,	Jeffrey A. Chase
Plaintiffs,	
v.	
THE WHARF (HOLDINGS) LIMITED, et al.,	Andrew J. Petrie
Defendants.	

COURTROOM MINUTES

Preliminary Pretrial Conference

08:00am Court in Session

Review/Discussion

ORDERED: 1. ***Wharf's Motion to Compel Arbitration of all Claims (DOC NO. 46 filed 4/13/95) DENIED.***

ORDERED: 2. ***Defendants' Motion to Dismiss All of Plaintiffs' Claims Pleaded in the Amended Complaint for Lack of Subject Matter Jurisdiction (DOC NO. 45 filed 4/13/95) DENIED.***

ORDERED: 3. ***Defendants' Motion to Dismiss Plaintiffs' Claims for Lack of Subject Matter Jurisdiction (DOC NO. 15 filed 1/17/95) DENIED.***

ORDERED: 4. ***Defendants' Motion to Extend Deadlines for Amending Pleadings, Adding Parties and Designating Nonparties at Fault (DOC NO. 38 filed 3/24/95) DENIED.***

ORDERED: 5. ***Steven Ng's Motion to Dismiss Plaintiffs' Amended Promissory Estoppel Claim Asserted Against Stephen Ng (DOC NO. 44 filed 4/13/95) DENIED.***

ORDERED: 6. ***Motion to Dismiss Fraud and Fraud-Based Claims, or in the Alternative,***

For More Definitive Statement (DOC NO. 16 filed 1/17/95) DENIED.

ORDERED: 7. ***New deadlines: discovery - 8/1/95; dispositive motions - 8/14/95.***

ORDERED: 8. ***Final Pretrial Conference set at 2:30 p.m. 11/17/95.***

ORDERED: 9. ***Simultaneous initial disclosures shall be made by 7/7/95.***

Rebuttal shall be made by 7/14/95.

Depositions shall be completed by 8/1/95.

Preliminary Pretrial Order entered.

08:14am Court in Recess